

United States District Court  
Eastern District of California

Robert John Sparks,

Petitioner,

vs.

Diane Butler, et al.,

Respondents.

No. Civ. S 02-0187 DFL PAN P

Findings and Recommendations

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Petitioner is a state prisoner with counsel seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner challenges his June 21, 2000, conviction in the Tehama County Superior Court of transporting and possessing methamphetamine (Health and Safety Code §§ 11379(a) & 11377(a)), possessing drug paraphernalia (Health and Safety Code § 11364) and escape (Penal Code § 836.6(b)). The possession charge was dismissed as a lesser included offense of the transportation charge. The court also found petitioner was convicted of a prior

1 felony.

2 After petitioner crashed his truck into a tree, left the  
3 scene, and returned (wearing a blue shirt), officers at the scene  
4 found a bag containing methamphetamine and drug paraphernalia on  
5 the ground near the truck. Petitioner admitted to one of the  
6 officers he had been driving the truck. (RT 89.)

7 Petitioner claims trial counsel provided constitutionally  
8 deficient assistance. One witness, a Bell Carter employee,  
9 reported seeing the truck crash and the driver, a man in a blue  
10 shirt, got out of the truck and stagger away. Petitioner's  
11 friend Carmen Cook, would have testified that petitioner was  
12 wearing a black vest and jacket and had his dog with him when he  
13 came to her house to get help after the accident but he took off  
14 the vest and jacket and left them at her house before returning  
15 to the scene. Petitioner argues that these accounts cast doubt  
16 on his guilt because they allowed an inference that drugs and  
17 paraphernalia may have belonged either to a man in a blue shirt  
18 or a man in a black vest and jacket with a dog. Petitioner  
19 contends that counsel worsened matters by reading into the record  
20 the description given by the Bell Carter employee, without  
21 calling Cook to testify.

22 Petitioner did not testify at trial and adduced no  
23 witnesses. Defense counsel argued that law enforcement testimony  
24 at the preliminary hearing and trial was inconsistent on minor  
25 details, that petitioner's fingerprints were not found on the  
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1 black bag or its contents and that it was not established beyond  
2 a reasonable doubt that the bag had ever been in petitioner's  
3 truck. (RT 170-81.)

4 Petitioner appealed to the California Court of Appeal for  
5 the Third District. He argued, without evidentiary support, that  
6 trial counsel had rendered ineffective assistance in failing to  
7 call unspecified witnesses. While the appeal was pending,  
8 petitioner filed a petition for habeas corpus in the appellate  
9 court in November 2000, submitting Carmen Cook's declaration in  
10 support of his claim he received ineffective assistance of  
11 counsel under Strickland v. Washington, 466 U.S. 668 (1984).

12 The court of appeal denied the petition for habeas corpus,  
13 without citation or analysis, on December 7, 2000. Then on April  
14 30, 2001, the court of appeal affirmed petitioner's conviction,  
15 stating as follows:

16 In the early afternoon of February 29, 2000, Officer  
17 Gina Giannoni was sent out to investigate a reckless  
18 driving call. Upon arriving at the scene, she saw a  
19 blue Ford pickup, which had crashed into a tree.  
20 Shortly after Officer Giannoni arrived, a female  
21 employee of nearby Bell Carter told Officer Giannoni  
22 she had seen the driver of the truck stagger away from  
23 the scene after he hit the tree. She described the  
24 driver as wearing a blue shirt and blue pants. This  
25 unidentified woman then left.

26 Checking the area of the accident, Officer Giannoni  
noticed a backpack and two bags inside the truck.  
Officer Woods then arrived at the scene. He also saw a  
backpack and two bags inside the truck.

After the officers arranged for the truck to be towed,  
defendant, wearing a blue shirt and blue jeans,  
returned. He told the officers the brakes had gone out  
in the truck, causing him to crash. While speaking

1 with the officers, defendant began rummaging through  
2 things in the truck.

3 Officer Woods noticed the smell of alcohol on  
4 defendant's breath and asked him whether he had been  
5 drinking. Defendant answered he had had one beer after  
6 the accident.

7 The officers sought and obtained defendant's consent to  
8 search the truck. During the course of the search,  
9 Officer Giannoni found a small black bag on the ground  
10 approximately 15 feet away from the truck. Inside the  
11 bag, the officers found a syringe, a glass pipe and .4  
12 grams of methamphetamine. Although defendant denied  
13 the bag was his, and there were no indicia of his  
14 ownership of the bag, the officers placed defendant  
15 under arrest, handcuffed him and placed him in the back  
16 seat of the patrol car.

17 Officer Woods began to take an inventory of the items  
18 in the truck. He found the backpack and one of the  
19 bags he had seen in the truck previously, but the  
20 second small bag was no longer in the truck. Officer  
21 Woods heard keys jingling and turned to see defendant  
22 running away. Officer Woods chased defendant and  
23 caught him about 200 yards away.

24 At trial, defendant offered no evidence or witnesses  
25 nor was there any objection to the imposition of  
26 consecutive sentences.

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On direct appeal, defendant contends his trial counsel  
was ineffective because he did not call as a witness  
either the eyewitness from Bell Carter or the  
"person/persons whom [defendant] visited upon leaving  
the scene following the accident." Defendant  
speculates that the witnesses would have confirmed his  
claim that the contraband found in the truck belonged  
to another person who departed the scene. Defendant  
has not made an adequate showing to sustain this claim.

"Reviewing courts will reverse convictions [on direct  
appeal] only if the record on appeal affirmatively  
discloses that counsel had no rational tactical purpose  
for [his or her] act or omission.'" (People v. Zapien  
(1993) 4 Cal.4th 929, 980.) "[T]his ineffective  
assistance claim cannot properly be raised on appeal,  
because the record before us does not reveal the basis

1 for trial counsel's decision not to [call particular  
2 witnesses] . . . , and that decision is not of the type  
3 for which there could be no satisfactory explanation."  
(People v. Hart (1999) 20 Cal.4th 546, 625.)

4 "To sustain a claim of inadequate representation by  
5 reason of failure to call a witness, there must be a  
6 showing from which it can be determined whether the  
7 testimony of the alleged additional defense witness was  
8 material, necessary, or admissible, or that defense  
9 counsel did not exercise proper judgment in failing to  
10 call him." (People v. Hill (1969) 70 Cal.2d 678, 690.)  
11 There is no such showing on this record.

12 There are myriad of reasons why defense counsel may  
13 have chosen not to call these witnesses, not the least  
14 of which is their testimony might have further  
15 implicated defendant, rather than being exculpatory.  
16 On the record before us, defendant has not established  
17 there were any witnesses who were not called who would  
18 have provided testimony material to his defense. (See  
19 People v. Rowland (1971) 21 Cal.App.3d 371, 374.) In  
20 the absence of a record demonstrating either the  
21 materiality of the potential witness's testimony or the  
22 complete lack of any rational tactical purpose for this  
23 failure, we will not deem counsel's actions deficient.

24 Answer, Exhibit A.

25 Petitioner petitioned the California Supreme Court June 14,  
26 2001, raising as issues for review the propriety of the appellate  
court's deciding his appeal based on lack of supporting evidence  
while simultaneously denying his petition for habeas corpus,  
which was supported by evidence, without citation. Answer Ex. C.  
The petition for review was denied summarily without comment July  
18, 2001. Answer, Exhibit B.

This court cannot grant habeas relief unless the state  
court's determination of petitioner's claim was contrary to or an  
unreasonable application of federal law as clearly established by  
the United States Supreme Court. A decision is contrary to

1 clearly established federal law if it fails to apply the correct  
2 controlling authority, or if it applies the controlling authority  
3 to a case involving facts materially indistinguishable from those  
4 in a controlling case, but nonetheless reaches a different  
5 result. Williams v. Taylor, 529 U.S. 362, 413-14 (2000). A  
6 decision involves an unreasonable application of federal law if  
7 the state court identifies the correct governing legal principle  
8 but applies that principle to the facts of the prisoner's case in  
9 a manner that is "objectively unreasonable." Lockyer v. Andrade,  
10 538 U.S. 63 (2003). "Clearly established federal law" is defined  
11 as the holdings of the United States Supreme Court existing when  
12 the state court issued its decision. Williams, 529 U.S. at 412.  
13 Circuit law is "persuasive authority" for purposes of determining  
14 whether a state court decision is an unreasonable application of  
15 Supreme Court law. Clark v. Murphy, 331 F.3d 1062 (9th Cir.  
16 2003); Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999).  
17 Where the state court summarily denies the petition without  
18 comment, the district court will look to the last reasoned state  
19 decision on the issue. Ylst v. Nunnemaker, 501 U.S. 797 (1991).  
20 If none exists, the district court must independently review the  
21 record to determine whether the state ruling was contrary to or  
22 an unreasonable application of clearly established federal law.  
23 Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000).

24 This court looks to the appellate decision as the last  
25 reasoned state decision on petitioner's claim of ineffective  
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1 assistance. Respondent contends petitioner's claim is "factually  
2 unexhausted" because he never filed a petition for habeas corpus,  
3 supported by the Cook declaration, in the California Supreme  
4 Court. Petitioner argues exhaustion requirements are met because  
5 his petition for review attached a copy of the habeas petition to  
6 the court of appeal and the Cook declaration. This court finds  
7 the California Supreme Court had a fair opportunity to act on  
8 petitioner's claim, and it is exhausted. See Kelly v. Small, 315  
9 F.3d 1063 (9th Cir. 2003).

10 To establish ineffective assistance of counsel, a petitioner  
11 must first show that, considering all the circumstances,  
12 counsel's performance fell below an objective standard of  
13 reasonableness. See Strickland v. Washington, 466 U.S. 668, 688  
14 (1984). The court must determine whether the acts or omissions  
15 identified by the petitioner were outside the wide range of  
16 professional, competent assistance. Id. at 690. If so, the  
17 court must then examine whether those errors prejudiced the  
18 petitioner. Id. at 693. Prejudice is found where "there is a  
19 reasonable probability that, but for counsel's unprofessional  
20 errors, the result of the proceedings would have been different."  
21 Id. at 694. A reasonable probability is "a probability  
22 sufficient to undermine confidence in the outcome." Id.; see  
23 also Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224 F.3d  
24 972, 981 (9th Cir. 2000). The prejudice analysis focuses on  
25 "whether counsel's deficient performance render[ed] the result of  
26 the trial unreliable or the proceeding fundamentally unfair."

1 Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

2       Petitioner argues that trial counsel's performance, in  
3 offering the Bell Carter employee's description of the man  
4 driving while failing to offer the available testimony of Carmen  
5 Cook that petitioner arrived at her house wearing a black vest  
6 and jacket and leading a dog, fell below an objective standard of  
7 reasonableness.

8       Assuming without deciding that counsel's performance fell  
9 below that of a competent lawyer, petitioner fails to show he  
10 suffered prejudice as defined by Strickland. The jury clearly  
11 reached a conclusion that the bag was in the truck when  
12 petitioner arrived at the scene, and it was petitioner who moved  
13 it to its location on the ground 15 feet away from the truck.  
14 This, coupled with petitioner's escape after he was arrested, the  
15 needle marks on his arm, and his strange behavior in ignoring  
16 Officer Giannoni and desperately rummaging through the property  
17 in the truck, supported the jury's implicit finding that he knew  
18 contents. There is no reasonable probability that, but for  
19 counsel's alleged error, the result of the proceedings would have  
20 been different; petitioner fails to "undermine confidence in the  
21 outcome" of his trial.

22       Accordingly, the court hereby recommends that the petition  
23 for habeas corpus be denied.

24       Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
25 findings and recommendations are submitted to the United States  
26 District Judge assigned to this case. Written objections may be



1 filed within 20 days of service of these findings and  
2 recommendations. The document should be captioned "Objections to  
3 Magistrate Judge's Findings and Recommendations." The district  
4 judge may accept, reject, or modify these findings and  
5 recommendations in whole or in part.

6 Dated: April 19, 2005.

7 /s/ Peter A. Nowinski  
8 PETER A. NOWINSKI  
9 Magistrate Judge  
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